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(3)

No. 07-897

IN THE SUPREME COURT OF THE UNITED STATES

LYNN HUST,

Petitioner,

v.

FRANK MARVIN PHILLIPS, JR.,

Respondent.

DECLARATION OF PRIOR FILING OF MOTION FOR LEAVE TO PROCEED In Forma Pauperis

DECLARATION (RE: In Forma Pauperis)

I, Frank Marvin Phillips, Jr., hereby declare that I filed a Motion to Proceed In Forma Pauperis and related Declaration of Indigency with this Court, by U.S. Mail, on February 7, 2008.

I hereby declare under penalty of perjury that the foregoing is correct and true. 28 USC 1746.

Dated this 30th day of May, 2008.

Frank M. Phillips Jr.

Frank Marvin Phillips, Jr.
Respondent

RECEIVED
JUN 02 2008
APPELLATE DIVISION
SALEM, OR 97301

COPY

In the Supreme Court of the United States

Lynn Hust,

Petitioner,

No. 07-897

v.

Frank Marvin Phillips, Jr.

Respondent.

Declaration of Filing

On May 30, 2008, I placed the ORIGINAL of (Respondent's) opposition to Petition for Writ of Certiorari in a sealed envelope, first-class postage prepaid, addressed to Clerk of Court, U.S. Supreme Court, Washington, DC 20543-0001, and delivered said envelope into the hands of M.C.C.F. staff member Deputy Douglas for placement in the U.S. Mail on this date at M.C.C.F., 4000 Aumsville Hwy. S.E., Salem, OR 97317-9112.

I declare under penalty of perjury that the foregoing is correct and true. 28 USC 1746.

Executed: May 30, 2008

Frank M. Phillips, Jr.
FRANK M. PHILLIPS, JR. PRO SE
M.C.C.F. -- #6199033
4000 Aumsville Hwy. S.E.
Salem, OR 97317-9112

COPY

In the Supreme Court of the United States

Lynn Hunt,

Petitioner,

No. 07-897

v.

Frank Marvin Phillips, Jr.

Respondent,

Declaration of Service

On May 30, 2008, I placed a TRUE COPY of the (Respondent's) opposition to Petition for Writ of Certiorari in a sealed envelope, first-class postage prepaid, addressed to Mary Williams, Solicitor General, 1162 Court St. N.E., Salem, OR 97301, and delivered said envelope into the hands of M.C.C.F. staff member Deputy Douglas for placement in the U.S. Mail on this date at M.C.C.F., 4000 Aumsville Hwy. S.E., Salem, OR. 97317-9112.

I hereby declare under penalty of perjury that the foregoing is correct and true. 28 USC 1746.

Executed: May 30, 2008

Frank M. Phillips Jr.

FRANK M. PHILLIPS, JR. PRO SE

M.C.C.F. -- #6199033

4000 Aumsville Hwy. S.E.

Salem, OR 97317-9112

COPY

No. 07-897

IN THE SUPREME COURT OF THE UNITED STATES

LYNN HUST,

Petitioner,

V.

FRANK MARVIN PHILLIPS, JR.,

Respondent.

(Respondent's) OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

*FRANK MARVIN PHILLIPS
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SALEM, OR 97301

COPY

CROSS-QUESTION PRESENTED

May the Petitioner (Hust) continually fail/refuse/neglect to present a full accounting of the pleadings below, some of which show that her concerns raised in this Court, as well as those raised in the Ninth Circuit, below, were asked, answered, and disposed of by the U.S. District Judge when he filed an Order which, at Hust's request, "clarified" whether or not the Judge had ordered "Comb binding" as a mandatory, or even preferred, method of binding prisoner briefs for prisoners in the Oregon Department of Corrections, when the Judge emphatically stated that he stated no such thing, and Hust pleads her case without ever owning up to the existence of the District Judge's clarification?

[Basis for Question, defined:

U.S. District Court Judge Ancer Haggerty's Opinion and Order of March 31, 2003 (CR #49) was published as Phillips v. Hust, 338 F.Supp 2d. 1148 (D. Or.) in December of 2004. Phillips v. Hust does not accurately or fully represent the court's final holding in the District Court case.. That is, the court's Opinion and Order was clarified in a subsequent Order at the request of the Petitioner (Hust) in her Motion for Reconsideration or Clarification dated April 29, 2003 (CR #50). Judge Haggerty's ORDER of Clarification was filed by the court on February 9, 2004 (CR #60). That Order amended the prior Opinion and Order **in substance and Petitioner Hust has never owned up to that fact.**

FOR THE THIRD TIME, Respondent (Phillips) submits that which Hust refuses to acknowledge, i.e., Judge Haggerty's ORDER (in Clarification), here, at **APP. 1-11.**

Had Hust submitted the **whole record necessary for her appeal in the 9the Circuit, there would be no issue for her appeal and, thus, no matter for this Court.** If there was error in these proceedings, it came in one of two ways:

(1) the District Court may have erred in not submitting his "Clarification" along with the Opinion and Order (which it clarified in substance) when he sent the material to the publisher of the Federal Supplement Reporter; OR

(2) the 9th Circuit erred in not Ordering Judge Haggerty to do so (i.e., recall or modify 338 F.Supp. 2d 1148 to conform to his actual **and final adjudication** on the "legal access" claim.]

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NOTE: "Opposition" to Petition for Writ of Certiorari is a MISNOMER. Respondent feels, indeed, that this case should be set before this Court and decided, but not on the grounds that the Petitioner raises, as those grounds present a false representation of the District Court proceedings; disregard and disrespect the adjudication by Judge Ancer Haggerty; undermine respondent's legitimate concerns; and corrupts the public view of legal proceedings.

OPINIONS BELOW

Respondent agrees with the Petitioner's characterization of the OPINIONS BELOW except that, once again, the Petitioner (HUST) has refused to tell the whole prior-litigation story, i.e, to wit:

Phillips v. Hust, 338 F.Supp. 2d 1148 (D. Or. 2003) was reported; it is reproduced for this court at Petitioner's App. 41-76; and it does establish that the Distict Court granted plaintiff's motion for summary judgment as to liability on "Phillips'" access-to-courts claim. THAT SUMMARY-JUDGMENT OPINION WAS CLARIFIED ON THE MOTION OF DEFENDANT (Hust) AND "HELD" CONTRARY TO PETITIONER'S MISREPRESENTATION OF THE CONTROVERSY HERE. Respondent hereby presents the Clarification of the Summary Judgment decision at App. 1-11.

STATEMENT OF JURISDICTION

Respondent accepts petitioner's Statement of Jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts petitioner's Constitutional Provisions Involved.

STATUTORY PROVISIONS INVOLVED

Respondent accepts petitioner's Statutory Provisions Involved.

INTRODUCTION

The Ninth Circuit held that (1) a prison librarian violated a prisoner's constitutional right of access to courts when she denied the prisoner's request to use the law library's comb-binding machine to bind a petition for certiorari, **comb-binding having been the prison's chosen method of binding large works, and the prison having offerred no other form of binding to the prisoner** (the law librarian was overruled, subsequently, by her boss, who ordered the necessary binding although such was untimely for the court); and (2) the librarian is not entitled to qualified immunity from damages because a reasonable prison official in her position would know that denying the prisoner's request to comb-bind his petition, **as the prison offerred no other form of binding to the prisoner**, violated clearly established law. According to the Ninth Circuit, the librarian is liable because the prosoner's failure to file a timely petition was foreseeable.

Not only was the librarian's refusal to provide **brief-binding of any kind or any description** the proximate cause of the prisoner's failure to meet his Supreme Court deadline, it was more that foreseeable (i.e, a prima facie matter) that an other-than-loose-leaf petition could not be timely filed under the conditions imposed on the prisoner by the librarian.

Moreover, **THIS CASE HAS UNNECESSARILY PROCEEDED ALL THE WAY TO THE U.S. SUPREME COURT ON A FALSE PREMISE REPEATEDLY ENDORSED BY THE PETITIONER WHO HAS NO QUALMS IN DECEIVING THE COURTS.**

STATEMENT OF THE CASE

I. Factual background

Respondent, for the purpose of simplicity, agrees that the Petitioner's "Factual background" section is a fair statement, for the purposes of this stage of activity in this Court.

II. The Ninth Circuit's decision

Again, Respondent agrees, at this time, with Petitioner's recital in this section entitled "The Ninth Circuit's decision," except for one qualifier. To wit:

When Hust denied "comb-binding" at Snake River Correctional Institution, she had, in fact, denied any form of binding whatsoever. Hust relied on her theory that she could force the inmate to submit a brief to the U.S. Supreme Court, or any court, in an unbound form and the receiving court would simply have to deal with it. In short, she felt no regard for rules of court that seek to accomplish organized pleadings via some form of binding.

It would seem that this Court, out of some deference to the District Court Judge's ruling should, at least, hear/read that which he had to say when Hust asked the court if the state institutions must now supply comb-binding. Judge Haggerty said:

> "Defendant [Hust] contends that this court interpreted the Rlule 33.2 requirement that submissions be 'stapled or bound' to mean that, as a matter of law, the defendant should have allowed the plaintiff to comb bind his materials because comb binding was mandated by this rule. (See Def.'s Mot. for Recons. at 1.) Defendant further argues that Rule 33.2 does not require materials submitted to the U.S. Supreme Court to be comb bound, and seeks reconsideration or clarification of the March 31, 2003 Opinion and Order because she believes that the court's holding rested on this point, so that Oregon Department ofCorrections ("ODOC") staff members 'now

run the risk of civil suit if they do not provide spiral plastic binding (comb binding) for inmate briefs headed to the U.S. Supreme Court.' (Id. at 5.) **Defendant is incorrect.** [Emphasis added]

"This court previously found that defendant was willfully blind to the applicable Supreme Court authority defining her duty to provide prisoners with access to the courts; therefore, this court declined to grant her motion for summary judgment on the basis of qualified immunity because the doctrine does not protect the actions of an unreasonable official, or the official who is 'plainly incompetent.' (See Op. and Order at 33-34, citing Saucier b. Katz, 533 U.S. 194, 203 (2001).). I **held that** [emphasis supplied]:

"'[a] reasonable official in defendant's position should know that if her actions could foreseeably result in causing an inmate plaintiff to miss a court filing deadline or violate a published court rule, thereby placing his claims in jeopardy of dismissal, such actions would beunlawful under the clearly established constitutional access to court standards set forth in Lewis [v. Casey 518 U.S. 343 (1996)], A reasonable law librarian, when faced with a question as to whether to provide a particular tool, **such as [emphasis added]** comb binding, to an inmate who requested its use in connection with filing a court document, would have contacted a supervisor or requested advice from an Oregon Department of Justice attorney assigned to ODOC matters. Defendant Hust took neither precaution.'

"Id. at 34).

"The facts in this case led me to conclude that denying plaintiff access to the comb binding machine amounted to a denial of access to the courts under the general rule articulated in Lewis v. Casey, 518 U.S. 343, 356-57 (1996). (See Op. and Order at 32-33.) **Specifically, I found as a matter of law that 'to deny tools or services SUCH AS** [such as was italicized by Judge Haggerty] **comb binding to an inmate plaintiff, so as to render him incapable of substantially complying with an applicable Supreme Court Rule, is to deny access to the courts under Lewis"** (ID. at 33 (emphasis added).) **I DID NOT REST MY FINDING ON A INTERPRETATION THAT RULE 33.2 REQUIRES THE COMB BINDING OF PRO SE PETITIONS IN GENERAL; RATHER, IT WAS BASED ON DEFENDANT'S FAILURE TO TAKE REASONABLE STEPS TO FACILITATE PLAINTIFF"S ACCESS TO** the Supreme Court by providing available binding tools or services when the plain language of the applicable U.S. Supreme Court **RULE REQUIRES SOME FORM OF BINDING** [Bold and caps, supplied].

> "The record on summary judgment did not show that the Snake River Correctional Institution's law library had a stapling apparatus capable of inserting a staple in the upper left-hand corner of a document that exceeded one hundred pages in length, that inmates would be premitted to use this apparatus, or that some other form of binding would be offered to inmates to permit them to comply with Rule 33.2. Plaintiff demonstrated that his document was too large to be secured by an ordinary staple; **in his case**, comb binding was shown to be the necessary, available, and reasonable alternative. **This holding does not require ODOC staff members to provide comb binding for every inmate brief that is directed to the U.S. Supreme Court**, and it is consistent with the plain language of the applicable state regulation, O.A.R. 291-139-0005, which sets forth the ODOC policy that inmates will be provided with 'necessary supplies for the preparation and filing of legal documents with the court.' (See Op. and Order at 32.). [Bold added]"

ORDER (of Clarification) District Court Docket #60, pages 6-8.

III. 9th Circuit's dissenting opinion; and

IV. 9th Circuit's dissent from denial of rehearing en banc:

The dissenters on both occasions were duped by petitioner Hust into believing that District Court Judge Haggerty had held that comb binding was both mandatory and necessary, when, in truth, he said nothing of the kind. The Judge held that **some form of binding was necessary** and he had but merely noticed that the prison, on numerous occasions, **had chosen** to meet that binding obligation with comb-binding. Thus, the dissenter's focus on comb-binding renders their opinions irrelevant to the legal-access claim, matter decided below, and unworthy of serious consideration. **Petitioner Hust's success in duping several judges on the Federal Bench must end here.**

REASON FOR GRANTING LIMITED REVIEW (i.e., to summarily remand for correction of District Court Record)

(See next page)

I. History of Hust's False Premise and Related Court Proceedings

Since February 9, 2004, based on her initial false premise, Petitioner Hust has frivolously dragged this case through two full-fledged rounds in the 9th Circuit and is now inviting this Court to become voluntarily snookered.

On March 31, 2003, U.S. District Court Juge Ancer Haggerty issued an Opinion and Order (C.R. #49) which granted summary judgment in favor of Respondent Phillips on his legal-access claim. Hust immediately filed, on April 29, 2003, her Motion for Reconsideration or Clarification (C.R. #50) of Judge Haggerty's Opinion. Therein, Hust raised concerns which became her later claims in the 9th Circuit. On February 9, 2004, Judge Haggerty issued an Order of Clarifecation (C.R. #60) in which he answered Hust's concerns. The clarification also had the effect of **amending in substance** the original Opinion and Order of 3-31-03. That document, C.R. #49, is the basis for the Judgment that Hust took on appeal. (See Pet. for Writ, at App. 82: "JUDGMENT *** Based on the Opinion and Order (#49) dated March 31, 2003 ***, judgment is hereby entered in favor of plaintiff ...."). **It is nothing short of unscrupulous to attack a judgment that the appellant FULL-WELL KNOWS has been modified by a subsequent Order of clarification, and not recognize the existence of the "Clarification." YET, THAT IS EXACTLY WHAT HUST HAS DONE IN THIS SET OF APPELLATE PROCEEDINGS.**

***[Judge Haggerty's Clarification of the Basis for the Judgment is found herein at App. 1-11] ***

Unfortunately, and lacking any mention of its modification/clarification, Judge Haggerty's Opinion and Order of 3-31-2003 became Phillips v. Hust, 338 F.Supp. 2d 1148 (D. OR., Pub. 12-2004). (See Findings of Fact and Conclusions of Law at Pet. for Writ of Cert at App. 77-81 [i.e., C.R. #91]:

> "Finally, plaintiff asks the court to publish its Opinion and Order [i.e., C.R. #49] resolving the parties cross-motions for summary judgment. ***. Because publication of the Opinion and Order would be beneficial for both inmates and correctional officers, the court grants plaintiff's request only insofar as the court shall recommend its March 31, 2003 Opinion and Order for publication."

At Pet. for Writ of Cert, App. 81.

In his recommendation to publish his summary judgment holding, Judge Haggerty failed to include (C.R. #60) his clarification along with (C.R. #49) his Opinion and Order of 3-31-2003. Thus, neither the Opinion and Order of 3-31-03 nor Phillips v. Hust accurately or fully represent Judge Haggerty's **final holding** in the District Court. And, as aforementioned, the Judgment under attack states that it relies on that very basis, C.R. #49 (Opinion and Order of 3-31-2003). Therefore, absent the "Clarification" Order (C.R. #60, Feb. 9, 2004), Petitioner Hust knows that she is not presenting to the appellate courts, or to this Court, the true nature of the District Court's holding wherein he specifically stated: "I did not rest my finding on a [sic] interpretation that that Rule 33.2 requires the comb binding of pro se petitions...." (See, here, last line of App. 7 and first line of App. 8). That statement is a part of the District Court's holding, yet petitioner Hust evades it.

Petitioner has good reason to leave-out mention of the district court's clarification; **it destroys her case**. In he petition for Writ of Certiorari, no doubt tongue in cheek, petitioner endlessly hammers on he legal falsity that comb binding was held to be mandatory, in which case the 9th Circuit erred in affirming, and that, in any event, Respondent Phillips had other methods in which to bind his Supreme Court documents. All her contentions are farces: (1) the "Clarification" establishes that comb binding was not held mandatory by the district court; and (#2) the Clarification established (a), the law library at SRCI had no "stapling apparatus capable of inserting a staple in the upper left-hand corner of a document that exceeded one hundred pages in lenght," (App. 8, middle of page) and (b) the "plaintiff cemonstrated that his document was too large to be secured by an ordinary staple, in his case[.]" Ibid. Moreover, as petitioner would cringe to admit, the trial judge was thorough in commenting that Respondent Phillips, **under his circumstances**, had no binding options available, and that point was made and not disputed in the district court proceeding:

> "Plaintiff points out that within the prison facility, items such as rubber bands, loose staples, metal rings, string, and other potential binding materials, are all considered contraband; a voluminous document must be bound in the prison law library, or not at all. (See Plaintiff's Response to Defendannt's Motion for Reconsideration at 2)." (Clarification Order, App.6, FN #1).

It doesn't take a wizard, then, to comprehend that no staples, plus no comb-binding, equals a refusal to bind Respondent Phillips' brief in **some form** as required by Rule 33.2, at SRCI.

This, now, is the **third** time that Respondent Phillips has had to submit the Clarification of the Opinion and Order (which is the

basis for the Judgment, as to the legal-access claim). See ORDER (of clarification) App. 1-11, attached. Aslo see, Request for Sanction, App 12-16, attached, where Respondent complained of the Petitioner's evading the clarification in the first round in the 9th Circuit; and see pages 13-24, following, which addresses the second time petition Phillips had to supply the clarification to the 9th Circuit, because Hust, yet again, persisted in evading the "modification of judgment" that is the whole purpose of the Clarification ORDER (App. 1-11).

II. THE LAW OF THE CASE

The law of the case in district court consists of the Opinion and Order (C.R. #49) and the ORDER clarifying the Opinion and Order (C.R. #60). The JUDGMENT which petitiner Hust took on appeal to the 9th Circuit was based on the Opinion and Order (C.R. #49) and it said so. But, that Judgment cannot rest on the Opinion and Order (C.R. #49) alone without creating a legal dilemma which corrupts (in Hust's favor) the entire 9th Circuit proceedings; i.e., the Judgment does not coincide with the law of the case. Petitioner Hust seized on that mishap and instead of complaining that the distric court erred in entering a flawed judgment, she knowingly appealed the flawed judgment, citing error to the trial court **which was negated by the trial court in his clarification** (C.R. #60). It atartling that the 9th Circuit, both the majority and the dissenters, has not rebelled against Hust's sleight-of-hand. It should be clear to any court reviewing this case that the JUDGMENT is incomplete absent the ORDER of Clarification of the Opinion and Order of which the Judgment relies.

III. Respondent's Best Argument in Explaining the Genesis of the Horribly Twisted Case

Respondent could offer in this Court no better argument than that which he set out in the 9th Circuit. Thus, he adopts and repeats the text of his APPELLEE'S ANSWERE TO APPELLANT'S [HUST'S] PETITION FOR PANEL REHEARING OR FOR REHEARING EN BANC. (See section entitled, post, "ADOPTED TEXT"). The text consumes 11 pages and, because petitioner Hust's false premise has not changed in, or since the 9th Circuit case, Respondent's opposition to that false premise has neither changed.

Of extreme significance in doing the above, respondent is currently a prisoner in a county jail awaiting a new trial after 15 years, asn as for the law library here, it is egregiously ill-equipped for defending or pursuing federa action of any kind. Thus, because the text is accurate, relevant and on-point, the text below makes a reasonable substitute for that which could not be produced here.

Accordingly, respondent simply asks that this Court gives the respondent a chance, and Judge Haggerty a chance, by overlooking that the below text had been directed to the 9th Circuit. **That the text is worthy of consideration is a given, as respondent prevailed on that pleading in the 9th Circuit.**

Petitioner's "game" is not without precedent. The legitimacy of some allegations against former-president Clinton hinged, he believed, on the meaning of the word "is." Here, petitioner's difficulty with being candid in this Court, as well as that same failure in the 9th Circuit, is that she seems unable to understand the

phrase "such as." Judge Haggerty did not mandate comb binding. Instead, and to the contrary, he enforced an obligation on ODOC to provide "tools and services **such as** comb binding" to accomplish **some form** of rule-compliant binding. If this Court can decipher "such as," as petitioner seems able to do, this case will be summarily remanded for a corrected JUDGMENT which includes reference to the ORDER of Clarification (C.R. #60), in which the District Court Judge, emphatically states that he **Did Not** find comb-binding to be mandatory in this case, or in any Oregon case.

CONCLUSION

Summary remand should occur whereby the Judgment, below, is CORRECTED to include the full extent of the District Court's holding.

MAY 30, 2008.

Respectfully submitted,

Frank M. Phillips Jr.

Frank Marvin Phillips, Jr.
Respondent PRO SE

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Phillips V. Hust, 04-36021 (9th Cir) 1

APPELLEE'S ANSWER TO APPELLANT'S PETITION FOR PANEL REHEARING OR FOR REHEARING *EN BANC*

A. [ADOPTED TEXT]

The foolishness of this appeal (as to the comb-binding issue), and the defendant's request for one type of re-review after another, must now come to an end. U.S. District Court Judge Ancer Haggerty has been thrashed and bashed by defendant's counsel Wasserman for what, absent Mr. Wasserman's misrepresentations, is no greater error than Judge Haggerty's failure to publish an important ORDER along with his opinion which became Phillips v. Hust, 338 F.Supp.2d 1148 (2004). (See APPENDIX 1-11: **ORDER** [CR #60] of Feb. 9, 2004, in response to Hust's motion for reconsideration or clarification [CR #50]of District Court's opinion and Order [CR #49] of March 31, 2003).

This Court would work a harsh disservice on Judge Haggerty were it to fail to read Judge Haggerty's astute ORDER (App. 1-11) and, in the resultant informational vacuum, reverse his well-reasoned decision and/or allow rehearing in this court of a matter asked by defendant, and answered by Judge Haggerty, in the proceedings below.[1] There really was no "comb-binding" issue to be appealed.

1 "Comb-binding" concerns as to Judge Haggerty's opinion should be limited to the fact that the Judge's ORDER of 2/9/04, addressing the defendant's imagined confusion as to the court's holding, should have been made a part of the published decision. The remedy, then, should be an order requiring the District Court to so amend its published decision to include the order.

April 2, 2007
04-36021

B. This is the second time that Hust's counsel has failed to direct the 9th Circuit to Judge Haggerty's (Supplemental) ORDER. (See App. 1-11).

In this appeal, plaintiff-appellee had to do a Supplemental Excerpt of Record because, *inter alia*, Hust neglected to file with this court both Judge Haggerty's important ORDER (on request for Clarification of his opinion) and the transcript of the V-NET damages trial, both vital to determining the truth of what occurred in the proceedings below.[2]

Here, the omission of Judge Haggerty's Order intentionally neglects the fact that Judge Haggerty went to some length, at the request of Hust, to explain that **he never held that comb-binding was mandated by any court rule** and **that he did not even suggest that comb-binding was a good choice for SRCI to make in attempting to meet binding necessities.** At most, Judge Haggerty made it very clear that, **since SRCI had chosen comb-binding as its strategy for binding large briefs**, it was incumbent on SRCI staff to use that which they provide. This whole appeal is a not-too- subtle attempt to white-wash the repercussions of Hust's actions in refusing to provide ANY type of binding, including the type which SRCI had provided in the past for huge briefs, i.e., comb-binding. Hust, in this request for rehearing is, again, attempting to bamboozle this court.

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2 Plaintiff sought sanctions against Hust in this appeal because plaintiff believed, and believes, that defendant's omissions of crucial document(s) are neither inadvertent nor for reason that the document(s) has/have no relevance. Plaintiff, thus, believes that the failure to address Judge Haggerty's (Supplemental) ORDER, in particular, is nothing short of misconduct on the part of Hust's counsel.

C. Hust's counsel has invented an issue for appeal that does not exist in the record.

Hust complains that comb-binding is not required by Supreme Court Rule (see Appellant's Brief and Appellant's Petition for Rehearing, cited throughout). That rhetorical "complaint" only becomes a viable complaint *IF* the U.S. District Court ***HELD*** that comb-binding was required. Judge Haggerty advanced nothing of the sort. Instead, he advised the parties:

> "I found that defendant was not entitled to qualified immunity because she was willfully blind to the applicable law requiring her to furnish plaintiff with the tools or services to give him the capability to access the courts, and because she failed to respond to plaintiff's request to bind his brief in a manner that a reasonable official in her position would have responded. ([Opinion] at 33-34)." App. 2 (Order of 2/9/04).

The Order did not rule that comb-binding was mandatory (although he did, justifiably, infer that some form of binding was mandatory). Neither is there mention of a required comb-binding. It was for SRCI to decide the method in which it provided the legal-access binding required on briefs. It is indisputable, from the record, that SRCI had chosen to use comb-binding to bind huge briefs. Judge Haggerty did not make that choice; and, prisoners at SRCI have no control over what SRCI selects as a binding strategy on large briefs. Prisoners can only seek that which prison policy has installed as the proper method; that method, **SRCI promulgated**, was comb-binding.

Judge Haggerty did not stutter; he squarely **DID NOT** require comb-binding:

> "***. I ruled that defendant violated plaintiff's constitutional right to access the courts because, as a matter of law, the denial of **available** tools or services to bind his brief rendered plaintiff substantially incapable of complying with the applicable Supreme Court rule. 9[Opinion] at 39-40)." App. 2 (Order of 2/9/04). (Emphasis added).

Judge Haggerty did not critique the suitability of SRCI's chosen method of binding large briefs, which *had been* comb-binding. The Court did not come in on this case at the time that SRCI was deciding what to use for binding large briefs, nor at a time when no method of binding large briefs did not even exist at SRCI. Instead, Judge Haggerty came into the case after SRCI already had an established track record of comb-binding large briefs. There was never a question before the judge as to whether or not SRCI's choice was a wise one or, even, a sufficient type of binding. Hust seems to be angry with herself, and SRCI, for chosing comb-binding in the first place. That's a type of invited error.

Judge Haggerty left the question for the future as to whether comb-binding was an adequate method of delivering brief-binding services. The majority, here, did the same. **The constitutional violation alleged, and proven, is the LACK of binding, not the TYPE of binding.** Hust provided no **timely** binding at all. Hust, not surprisingly, completely fails to address the possibility that SRCI's choice of comb-binding as a method of binding large briefs may not adequately satisfy the Supreme Court's preference as to form of binding. Instead, she endeavors to blame the whole situation on plaintiff, the U.S. District Court and this majority decision.

Thus, Hust's counsel's argument is not with "outsiders" but with the law library staff and others at SRCI. Plaintiff did not choose the style of binding-- the SRCI staff did. Thus, Hust convinces us that that choice may be a poor one.[3]

Judge Haggerty explicitly set himself apart from any hint that comb-binding might be required by Supreme Court Rule 32.2: [sic, 33.2]

> "Defendant contends that this court interpreted the Rule 32.2 [sic, 33.2] requirement that submissions be 'stapled or bound' to mean that, as a matter of law, the defendant should have allowed the plaintiff to comb bind his materials because comb binding was mandated by this rule. (See Def's Mot. for Recons. at 1). [S]he believes that the court's holding rested on this point, so that Oregon Department of Corrections ("ODOC") staff members 'now run the risk of civil suit if they do not provide spiral plastic binding (comb binding) for inmate briefs headed to the U.S. Supreme Court.' ([Def's Mot. for Recons.] at 5). **Defendant is incorrect.**" (App. 6; Order of 2/9/04; Emphasis added).

Settling the matter, in concrete terms, Judge Haggerty wrote, **using *italics*, emphasizing the phrase "*such as*":**

> "This court previously found that defendant was willfully blind to the applicable Supreme Court authority [e.g., Lewis v. Casey] defining her duty to provide prisoners with access to the courts[.]
>
> "The facts of this case led me to conclude that denying plaintiff access to the comb binding machine amounted to denial of access to the courts under the general rule articulated in Lewis v. Casey, 518 U.S. 343, 356-57 (1996). (See Op. and Order at 32-33). Specifically, I found as a matter of law that 'to deny tools or services ***SUCH AS*** comb binding to an inmate plaintiff, so as to render him incapable

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3 Banking on success in this appeal, SRCI **has not, still,** chosen a method other than comb-binding for large briefs going to any court. Thus, another potential calamity lurks at SRCI for the next prisoner in need of large-brief binding.

> of substantially complying with an applicable Supreme Court Rule, is to deny access to the courts under Lewis.' (Id. at 33 (emphasis added).) **I did not rest my finding on a** [sic] **interpretation that Rule 32.2 requires the comb binding of *pro se* petitions in general**; rather, it was based on defendant's failure to take reasonable steps to facilitate plaintiff's access to the U.S. Supreme Court by providing available binding tools or services when **the plain language** of the applicable U.S. Supreme Court rule requires **some form of binding**." (App. 8; Bold supplied; italics and parentheses in original).

D. If Judge Haggerty's ORDER does not prevent rehearing, then, the Judge may as well be reversed, so he may, again, declare that comb-binding is not required by U.S. Supreme Court rule, and that, accordingly, he did not base his decision on that premise.

It appears that the defendant's concerns would be rendered moot, as to comb binding confusion if, in the course of the remand for further damages findings (ordered by the majority in this Court), the District Court is also advised to include its Order [CR #60] (i.e., App. 1-11) in its final Opinion, resolving the case without fanfare. Neither the panel's decision in this Court, nor the District Court decision, requires any further legal findings and neither does either decision, read in light of the (Supplemental) ORDER, offend any of the U.S. Supreme Court cases controlling legal access questions (as complained of by defendant).

E. The District Court opinion AND ITS CLARIFICATION is the Law of Case.

Judge Haggerty's ORDER of 2/9/04 is a substantial element of the law of the case in the action below. The defendant's questions/concerns, as to whether comb

binding is required by Rule 33.2, were actually litigated via defendant's Motion for Reconsideration/Clarification; were controverted by plaintiff's Response thereto; and, were resolved by Judge Haggerty's ORDER of 2/9/04, wherein he explicitly set forth that, No, "I did not rest my finding on an [sic] interpretation that Rule 33. requires the comb-binding of *pro se* petitions in general[.]" (App. 7-8).

If, as a matter of *res judicata* or law of the case, someone asked whether the District Court held that comb-binding was required by Rule 33.2, the answer is profoundly, "No." Hust has attempted to lure, first, the 9th Circuit panel, and now the 9th Circuit En Banc, into an inside-out long-winded discussion as to whether the District Court in Portland was incorrect to hold that comb-binding was rule-bound, i.e., mandatory. **Hust and her counsel will have to find a different ruling to appeal**, because Judge Haggerty **did not hold** that comb binding was mandatory or, even, a wise method of binding. The court simply, and correctly, found that the record showed that SRCI had chosen comb-binding as the method to bind huge briefs in the past and, in the absence of any evidence that SRCI had developed another method for binding huge briefs, comb binding remained **SRCI's choice** of strategy for binding huge briefs[4].

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4 Hust, it seems, seeks a preliminary ruling (a critique) spelling out that this court feels that SRCI's choice of binding is not in compliance with court binding-rules and, thus, that SRCI (Hust) has no obligation to provide that mistaken choice of binding. In fact, Hust asks this court to enter into an advisory situation, a micro-managing situation, where it would tell SRCI what is, and what isn't, appropriate as binding strategy. Courts are not generally authorized to gate-keep on state decisions in order to prevent civil suit. If comb-binding is a bad choice,

F E. **SRCI staff left Department of Justice hanging out to dry.**

Ex-law librarian Hust and her cohorts do/did not always operate in conformance with the desires of state's counsel. Counsel Wasserman is not happy that SRCI both chose comb binding as a method for binding huge briefs and, then, Hust got into trouble for refusing to provide that very service when called upon to do so. No doubt, Counsel Wasserman is not enthusiastic about this Court learning that SRCI, still, has adopted no policy or mechanism for binding large briefs other than comb binding. Moreover, no decision has been made, by SRCI staff, as to what would better suit Rule 33.2, or any other court rule on brief preparation. That leaves Hust's counsel hanging out to dry. Counsel must face the facts that SRCI, not plaintiff, nor Judge Haggerty, chose comb binding; that SRCI still has no other method of binding large briefs; that, even during this litigation, SRCI has not stepped-up to provide a better method of meeting binding needs; and that this whole appellate "game" has been to whitewash Hust's acts and to pass the buck in regard to who is responsible for **UNTIMELY** binding plaintiff's brief. The ultimate clincher, if one is needed, is that the boss over law libraries, Program Service Manager Judy Gilmore, and Hust's cohorts foil Hust's main contentions and doom

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that is a question for another day, another case, alleging a different form of rights violation. Here, the question is whether or not Hust's refusal to supply **timely** binding, of any sort, is a violation of legal access. If comb-binding had been provided, and the U.S. Supreme Court had rejected that form of binding, then, the claim against SRCI (Hust) would focus on the mistaken choice of **type** of binding that SRCI provides. That potential problem never developed and this Court should not enter into that unnecessary inquiry.

the request for rehearing. (See Appellant's Petition for Rehearing ["Pet. Rehrg."] at p. 4, appellant citing to record and Gilmore's order to comb-bind).

The record shows that Gilmore and other SRCI library staff have utilized comb binding as a better-than-nothing form of binding. By denying binding, even the less-than-perfect comb binding, Hust acted both outside of her obligations; without SRCI approval; and, in fact, in disobedience of established policy. Hust's counsel admits:

> "The panel majority **correctly** recognized that, as interpreted in Lewis, Lindquist, and other cases, the constitutional right of access to the courts require prison officials to supply inmates with '**some means** of preparing documents that comply with the rules of court' in which a case is pending. Slip Op. at 1780)." Pet. Rehrg. at 8, Emphasis added.

Hust's counsel is angry that SRCI chose comb binding as the poor, but ONLY, method for preparing huge briefs, and he would rather SRCI staff not bind at all, i.e., that was the course that Hust took; but, that decision was not supported by Hust's superior, Gilmore. It was Hust's conduct that created the missed deadline and, thus, the constitutional violation. Gilmore had no qualms over providing binding, even if that binding turned out to be comb binding. (*see* Pet. Rehrg. at 4).

For example, had plaintiff clairvoyantly felt the necessity to kite Gilmore rather than defendant Hust, the record in this case exhibits that Gilmore would have **timely** authorized binding. Contrarily, rather than contact her boss (Gilmore), Hust denied the binding request, only to have her boss overrule her. Thus, the

problem here is Hust, not the SRCI policy of utilizing comb binding as a method of fulfilling binding needs. (See FN 4, *supra*)[5].

CONCLUSION

In light of the District Court ORDER (*see* App. 1-11), the appellant cannot rationally lay claim to any of the requisite purposes that would support in *En Banc* rehearing as set out in FRAP 35 (a) or (b). The District Court opinion and the majority decision in this court conflict with no other decisions of this court and the facetious "comb-binding" claim presented for rehearing is of no importance to anybody, or any court, except for defendant Hust. It was Hust's employer, SRCI, that established the use of comb binding at SRCI and Hust cannot appeal her farcical claim that Judge Haggerty had declared (directly or implicitly) that comb binding was mandatory under S.Ct. Rule 33.2 because **he actually ruled to the contrary**. (*See* ORDER at App. 1-11).

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5 Hust's counsel is attempting to bait this court into the hyper-technical analysis of what type of brief binding will make the U.S. Supreme Court smile the widest, when the question is much more simple: Does SRCI's policy choice of comb-binding come closer to satisfying briefing rules than sending 244-plus pages to the Supreme Court loose-leaf? And, in any event, unlike **plastic spiral binding**, counsel Wasserman has not exhibited a single particle of evidence that any court has ever rejected comb-binding as a fulfillment of a binding requirement.

(huge difference)

Therefore, no rehearing of any sort should be granted and, at most, an order might be directed to the district court to include its order (App 1-ll) in its final decision, as a part of the remand proceeding for damages findings, *inter alia*.

(Also see, Section "A" at p. 1, *supra*, and FN 1, *supra*).

Respectfully submitted,

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